No. 22,710

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SAN CLEMENTE PUBLISHING CORPORATION; COASTLINE PUBLISHERS, INC.,

Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board.

RESPONDENT'S BRIEF.

VAN DE WATER, POWELL & PATERSON,
By LEE T. PATERSON,
1100 Glendon Avenue,
Los Angeles, Calif. 90024,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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RESPONDENT'S BRIEF.

Jurisdiction.

As stated in General Counsel's Brief, this Court has jurisdiction, which is conceded by Respondent.

Statement of the Case.

In October, 1966, San Clemente Publishing Corporation and the Orange Typographical Union, No. 579, International Typographical Union, AFL-CIO[1] orally agreed to have a minister determine whether the Com-

[1]San Clemente Publishing Corporation, Respondent in this Case, will be hereinafter referred to as "Company", and Orange Typographical Union No. 579 will be hereinafter referred to as "Typographical Union" or "Union".

pany's employees wished to be represented by the Typographical Union [R 21, JX 1].[2] On October 28, 1966, the minister polled the Company's five Composing Room employees and told the parties that a "majority" of the employees wished Union representation [*Ibid.*]. No actual count of the votes, however, was given to either of the parties. Both parties indicated their willingness to proceed in good faith as they had agreed [*Ibid.*].

On about November 29, 1966, the parties met for bargaining negotiations [*Ibid.*]. Neither party's conduct was found to be dilatory or in bad faith.

Sometime during the following week one of the employees in the bargaining unit terminated, and he was replaced by a new employee [R 21, Tr. 41, JX]. Thereupon, on December 8, three of the Company's five employees voluntarily presented themselves to the manager of the Company and stated that they did not wish to be represented by the Typographical Union [R 21, Tr. 40, JX]. They revealed that in the prior poll by the minister only three of the five Composing Room employees had wanted the Union and that now three of the five employees did not want the Union. The employees submitted a signed petition stating that they did not wish to be represented by the Union [R 21, JX].

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[2]"R" refers to the formal documents bound as "Volume I, Pleadings"; "Tr" refers to the stenographic transcript of testimony at the hearing. References designated "GCX" and "JX" are to the General Counsel's exhibits and the Joint Exhibit, respectively.

In view of the wishes of a majority of its employees, the Company withdrew recognition of the Union on December 14, 1966 [R 21; GCX 1(e) para. 11; GCX 1-(1)]. Subsequently, the Company filed a petition for a representation election with the National Labor Relations Board which the Board rejected because of the pendency of this proceeding [R 22].

The Trial Examiner found that the Company "did not give the agreed bargaining relationship a reasonable opportunity to function" and that the Union ". . . notwithstanding its loss of majority status following recognition, has been at all material times, and now is, the exclusive bargaining representative. . . ." [R. 24]. The Trial Examiner concluded that the Company had violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act [R 25]. The National Labor Relations Board affirmed all of the Trial Examiner's findings and ordered the Company to bargain with the Union [R 32-3].

ARGUMENT.

The Board's Order Requires the Respondent to Bargain With the Uncertified Representative of Less Than a Majority of His Employees and Therefore Cannot Be Enforced.

Respondent withdrew recognition from the Orange Typographical Union when a majority of its five employees tendered a petition stating that they no longer wished to be represented by the Union. The only question to be decided is whether this violates Respondent's duty ". . . to bargain collectively with the representatives of his employees . . ." [Section 8(a)(5) Taft-Hartley Act, 61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 158 (a)(5)].

Contrary to Petitioner's Brief, it is not "well-settled that 'a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed'" (Petitioner's Br. p. 4). Instead, the courts and the Board have held that a company must bargain for one year in the case of NLRB conducted secret-ballot elections,[3] and for a "reasonable period" in the case of Board Orders and Settlement Agreements.[4] The rule which was applied in this case holding that an employer must bargain with an informally selected union after it has lost its majority was created

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[3]*Brooks v. N.L.R.B.*, 348 U.S. 96, 75 S. Ct. 176 (1954); *N.L.R.B. v. Holly-General Co.*, 305 F. 2d 670 (9th Cir. 1962).

[4]*I.A.M. v. N.L.R.B*, 311 U.S. 72, 61 S. Ct. 83 (1940); *Franks Bros. Co. v. N.L.R.B.*, 321 U.S. 702, 64 S. Ct. 817 (1944).

by the Board in 1966[5] and has never been enforced by the courts.

In *Brooks v. N.L.R.B.*, 348 U.S. 96, 75 S. Ct. 176 (1954), the Supreme Court approved the rule that absent unusual circumstances, an employer must bargain with a union for one year following an NLRB conducted secret-ballot election. However, the Court was careful to point out that the courts and the Board had never approved the rule "to a collective bargaining relationship established other than as the result of a *certification election*" (Italics supplied) (*Id.* at footnote 9). In its decision, the Court noted the difference between certification elections and voluntary recognition:

> "Since an election is a solemn and costly occasion conducted under safeguards to voluntary choice, revocation of authority should occur by a procedure no less solemn than that of the initial designation. A petition or a public meeting—in which those voting for and against unionism are disclosed to management, and in which the influences of mass psychology are present—is not comparable to the privacy and independence of the voting booth." (*Id.* at 99, 100).

An NLRB secret-ballot election is easily understood by employees as a formal procedure which requires careful deliberation and which will bind the employee in his decision. Other methods of determining employee

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[5]See *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966); *Montgomery Ward & Co., Inc.*, 162 NLRB No. 27, decision pending (7th Cir.) No. 16, 602.

choice (*e.g.*, employee polls, card counts, mass meetings and petitions) are less formal and are easily susceptible to coercive pressures and mob psychology. In numerous recent cases the courts have refused to require employees to bargain with unions selected under these conditions.[6] As stated in one of those decisions:

> "It is well known that people solicited alone and in private, will sign a petition and later, solicited alone and in private, will sign an opposing petition, in each instance out of concern for the feelings of the solicitors and the difficulty of saying 'no'. This inclination to be agreeable is greatly aggravated in the context of a union organizational campaign when the opinion of fellow employees and of potentially powerful union organizers may weigh heavily in the balance."
>
> *N.L.R.B. v. S.S. Logan Packing Co., supra,* at 565.

Peaceful negotiations are only one part of stable and orderly industrial relations. Congress and the courts have recognized this by guaranteeing employees the right to join or not join labor organizations[7] and

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[6]*N.L.R.B. v. S.E. Nichols Co.*, 380 F. 2d 438 (2nd Cir. 1967); *N.L.R.B. v. S.S. Logan Packing Co.*, 386 F. 2d 562 (4th Cir. 1967); *N.L.R.B. v. Great Atlantic & Pacific Tea Co.*, 277 F. 2d 759 (5th Cir. 1967); *N.L.R.B. v. Shelby Mfg. Co.*, 390 F. 2d 595 (6th Cir. 1968); *N.L.R.B. v. Johnnie's Poultry Co.*, 344 F. 2d 617 (8th Cir. 1965); *Don the Beachcomber v. N.L.R.B.*, 390 F. 2d 344 (9th Cir. 1968); see "Union Authorization Cards and the Duty to Bargain", an address by NLRB Associate General Counsel, H. Stephan Gordon (February 15, 1968), 67 LRR 165.

[7]Section 7 of the Act, see Appendix.

by requiring unions to have a majority support as a condition of their right to bargain.[8]

In fostering collective bargaining, the Board is sacrificing the rights of employees guaranteed by the Act "to bargain collectively through agents of their own choosing"[9] As stated in *N.L.R.B. v. Mayer,* 196 F. 2d 286 (5th Cir. 1952), "Under Secs. 1 and 7 of the Act, the employees have the right 'to bargain collectively through representatives of their own choosing'. They have the right to revoke. *N.L.R.B. v. Hollywood-Maxwell Co.,* (CA-9), 126 F. 2d 815, headnotes 7 and 9." (*Id.* at 289.) In the *Mayer* case,[10] the em-

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[8]Section 9(c) of the Act, see Appendix. *N.L.R.B. v. Hollywood Maxwell Co.*, 126 F. 2d 815 (9th Cir. 1942); *Glendale Mfg. Co. v. Local 520, I.L.G.W.U.*, 283 F. 2d 936 (4th Cir. 1960). In *Garment Workers v. N.L.R.B.*, 366 U.S. 731, 81 S. Ct. 1603 (1961), the Court found that an employer's good faith grant of recognition to a union when it actually did not represent a majority of the employees was an unfair labor practice.

[9]Section 7 of the Act, see Appendix.

[10]The *Mayer* case has been distinguished in two of the cases relied on by the Board. In *Brooks v. N.L.R.B., supra,* the Supreme Court said,

> "Both before and after the Taft-Hartley Act, the Board and the courts did not apply the rule to a collective bargaining relationship established other than as a result of a certification election. E.G. Joe Hearin, 66 N.L.R.B. 1276 (card-check); Labor Board v. Mayer, 196 F.2d 286 (C.A. 5th Cir.) (card-check) . . .". (348 U.S. at 101)

And in *N.L.R.B. v. Universal Gear Service Corp.,* No. 17, 699 (6th Cir.), decided May 16, 1968, the court said,

> "In addition, it cannot be said that the Board's determination favoring stability of bargaining relationships should, in this case, yield to a countervailing consideration of the employees' right to freedom of choice of bargaining representative, since the record here does not disclose that a majority of the employees in the bargaining unit has rejected the union. Cf. N.L.R.B. v. Mayer, 196 F. 2d 286 (5th Cir. 1952)."

ployer voluntarily recognized a union after nine of his eleven employees signed authorization cards. Two weeks later after two bargaining meetings, seven of the company's employees signed a petition repudiating the union. The company then petitioned the Board for a representation election. After two more bargaining meetings, the company refused to meet with the union again. Seven months later, the Board denied the company's petition for an election. The court refused to enforce the Board's Order, saying,

> "Here the employees first chose the Union, then repudiated it, as their representative. Through opposing the Union, respondent has endeavored to follow the expressed wishes of his employees. There appears here no effort on the part of the employer to subvert statutory processes, nor to defeat the functioning of the Board. It should be borne in mind that the employees, not the employer, are the actors in repudiating this Union. If we should compel respondent to bargain further with this Union, which the employees themselves have obviously repudiated, the result would be to deny them the right, secured by the Act, to bargain through the representative of their choice. The choice has here been made by the employees in a manner that does not admit of dispute. When as here, the employer's recognition of the bargaining representative is not based upon a certification by the Board but is wholly voluntary and informal, we see no reason why the employer cannot also accede to the wishes of seven out of his then ten employees, and discontinue with it." (*Ibid.*)

Where there has been a court decree, a Board order, or a settlement agreement requiring a company to bargain, it will be required to bargain with the union for a reasonable period of time. The reason for bargaining, in these cases, is not to insulate the union from the changed desires of the employees, but to remedy the unfair labor practices of the employer against the union and the employees. As stated in a case relied upon by the Board,

> ". . . the settlement agreement clearly manifests an administrative determination by the Board that some remedial action is necessary to safeguard the public interests intended to be protected by the National Labor Relations Act. . . ."
>
> *Poole Foundry & Machine Co. v. N.L.R.B.,* 192 F. 2d 740, 743 (4th Cir. 1951) cert. denied, 342 U.S. 954.

In *Franks Bros. Co. v. N.L.R.B.,* 321 U.S. 702, 64 S. Ct. 817 (1944), the company had wrongfully refused to bargain with a union which had represented a majority of its employees. The Board found that

> "the only means by which a refusal to bargain can be remedied is an affirmative order requiring the employer to bargain with the Union which represented a majority at the time the unfair labor practice was committed." 44 NLRB 898, 917.

The Supreme Court enforced the Board Order, holding that

> ". . . where a union's majority was dissipated after an employer's unfair labor practices in refusing to bargain, the Board could appropriately find that such conduct had undermined the prestige of the

> union and require the employer to bargain with it for a reasonable period despite the loss of majority."[11]

The facts show that after the Company voluntarily recognized the Union and bargained with it, a majority of the Company's employees repudiated it. At no time has the Company attempted to bargain in bad faith or to undermine the Union. The employees after informally choosing the Union have determined that they do not wish to be represented by it. The Board's Order requiring the Company to bargain denies them the right, guaranteed by the Act, to bargain through the representative of their choice, and therefore the Board's Order should not be enforced.

Conclusion.

For the reasons stated, Respondent respectfully submits that the Board's Order should not be enforced.

Resepctfully submitted,

VAN DE WATER, POWELL & PATERSON,
By LEE T. PATERSON,
Attorneys for Respondent.

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[11] *Brooks v. N.L.R.B.*, 348 U.S. 96, 75 S. Ct. 176 (1954).

Certification.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LEE T. PATERSON

APPENDIX.

"Short Title and Declaration of Policy"

Section 1.

"(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

"It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

* * * *

"Rights of Employees"

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted

activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * * *

"Representatives and Elections"

"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

* * * *

"(c) (1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> "(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective

bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."